Supreme Court, U. S.
FILED
JUL 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1421

PAUL CASHEN and IRENE CASHEN,
Petitioners,

vs.

FRANK SPANN, ROBERT BICKLEY, CHARLES M. EGAN, JR., JOHN DUNNE, individually and as servant, agent or employee of CHARLES EGAN, JR., "JOHN DOE," being a fictitious name of the "Reliable Informer," NEW JERSEY BELL TELEPHONE COMPANY, ANTHONY DI BIASI, THE COUNTY OF MORRIS, THE BOROUGH OF WHARTON and THE STATE OF NEW JERSEY,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counter-Statement of Matter Involved

Pursuant to Supreme Court Rule 40-3, Respondent, State of New Jersey respectfully submits the following additions and corrections to Petitioner's Statement of the Matter Involved.

This matter involves a civil suit arising out of the investigation of gambling activities in Morris County and the execution of a search warrant at the residence of the plaintiffs Paul and Irene Cashen. The investigations primarily concerned four individuals, Raymond Dragos, Johnny Gallo, a/k/a John Peragallo, Stanley Mosher and Thomas O'Mara, who were as a direct result of the investigation arrested, indicted and, subsequently, pled guilty to various charges of illegal gambling.

On June 18, 1970, County Investigator Robert Bickley executed and presented an affidavit in support of search warrant to the Honorable Jacques H. Gascoyne, J.C.C., which described in detail some results of that investigation (See App. Div. Pa4 to Pa23).* According to the affidavit, as a part of that investigation a check was made of telephone records for the Log Cabin Tavern, site of extensive gambling activities. Detective Spann learned of numerous calls to the Cashen residence and to a number listed to the U.S. Government, Picatinny Arsenal, which was allegedly in the control of Paul Cashen. Investigator Bickley obtained corroboration from a person at Picatinny Arsenal who had previously given reliable information relative to gambling activities. He learned that Paul Cashen was accepting horse and numbers bets (App.Div. Pa18 to Pa19). Subsequently, additional information was obtained from the telephone company of calls from Dragos and Peragallo to Paul Cashen. Judge

* Pa refers to the appendix of petitioner's brief filed in the Superior Court, Appellate Division.

Gascoyne issued the warrant, which was executed on June 19, 1970 by County Detective Anthony DiBiasi and other members of the prosecutor's staff with the assistance of the Borough of Wharton Police Department (See App. Div. Pa1 to Pa3). The ensuing search failed to uncover any evidence of gambling.

The plaintiffs commenced a law suit on May 19, 1971 in the Superior Court, Law Division, Essex County (venue was subsequently transferred to Morris County) against Morris County Prosecutor Charles Egan, Jr. and members of his staff, Detectives Frank Spann, John Dunne and Anthony DiBiasi and Investigator Robert Bickley, and against the County of Morris, the Borough of Wharton, the New Jersey Bell Telephone Company and "Joe Doe," being the name of a "reliable informer." An amended complaint filed on December 2, 1971 was grounded in theories of negligence, as well as intentional acts of wrongdoing including false arrest and imprisonment, slander, libel and assault.

As part of discovery, written interrogatories were propounded on Investigator Robert Bickley and Detective Frank Spann. On advice of counsel these defendants refused to answer questions regarding the "reliable informer." On May 12, 1972 the trial court denied plaintiffs' motion for more specific answers (App.Div. Pa42, Pa43). The court also granted summary judgment in favor of the Borough of Wharton. On June 9, 1972 a hearing was held on motions for summary judgment presented by the remaining defendants, and on July 5, 1972 the court entered an order granting summary judgment to all remaining defendants (App.Div. Pa50, Pa51). Notice of Appeal from the latter order was filed on July 12, 1972 (App.Div. Pa52, Pa53). No appeal was taken from the summary judgment in favor of the Borough of Wharton.

On November 2, 1973 the Appellate Division rendered their decision affirming summary judgment in favor of defendants Prosecutor Egan, Detectives DiBiasi, County of Morris, and the New Jersey Bell Telephone Company, and reversing summary judgment in favor of Investigator Bickley and Detectives Spann and Dunne. The reviewing court also ordered disclosure of the informer's identity referred to in defendant Bickley's affidavit.

After the decision of the Appellate Division, the County of Morris and its insurer, the Fireman's Fund American Insurance Company, which represented defendants-petitioners in the Law and Appellate Divisions, declined to continue representation. At the request of the Morris County Prosecutor the Division of Criminal Justice filed a Notice of Petition for Certification on November 26, 1973, to preserve the rights of the defendants-petitioners pending the resolution of the question of liability of the County of Morris to represent them. The defendants-petitioners brought an action for declaratory judgment in the Superior Court, Chancery Division, Morris County, and on January 16, 1974, that court ordered the County of Morris to provide Bickley, Spann and Dunne with representation. Notice of Appeal was filed on February 1, 1974.

On January 16, 1974 defendants-petitioners filed an amended Notice and a Petition for Certification. On January 22, 1974, plaintiffs-respondents filed a letter in lieu of brief advising the New Jersey Supreme Court that they would rely upon their Appellate Division briefs and appendix.

On January 28, 1974 the State of New Jersey requested permission to intervene and file a petition for certification and supplemental brief in the matter. This motion was granted on February 26, 1974.

The New Jersey Supreme Court subsequently held, *inter alia*, that:

> "In our view, basic considerations of fairness which ultimately circumscribe the informer's privilege require that in civil cases, when disclosure of a confidential informer's identity is vital to a party's case, the respective interests must be balanced as contemplated by *Roviaro*, [353 U.S. 53 (1957)], *Burnett*, [42 N.J. 377, 201 A.2d 39 (1964)], *Oliver*, [50 N.J. 39, 231 A.2d 805 (1967)], and a decision reached as to anonymity or disclosure. Such considerations may require that the identity of the informant be disclosed to a party in a civil suit under some circumstances. Nevertheless, this is a step to be taken with caution and with full appreciation of all the consequences." 66 N.J. 541, 557, —— A.2d ——, ——.

On the basis of the foregoing, the Supreme Court vacated the order of the Appellate Division directing disclosure of the informer's identity and remanded the matter for further proceedings consistent with its opinion. Specifically, the Court concluded:

> "While we are satisfied that the Appellate Division correctly identified the balancing test to be applied in cases such as this one, we doubt that either the trial court or the Appellate Division had before it an adequate record to actually perform the delicate and difficult balancing of interests called for. Hence we vacate the order of the Appellate Division directing disclosure of the identity of the informant." 66 N.J. 541, 555, —— A.2d ——.

Thereafter, on May 13, 1975, appellant's Petition for Writ of Certiorari in the above-entitled matter was docketed in the Supreme Court of the United States. Subsequent thereto, on May 28, 1975, the Honorable William J. Brennan, Jr. denied petitioner's application for a stay.

POINT I

Petitioner's claim that he has been deprived of his rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution, is premature in view of the State Supreme Court's order remanding the matter for further fact finding.*

Finality

Before proceeding to a formal discussion of the ripeness issue, it is necessary to consider the question of whether the present case satisfies the finality requirement embodied in 28 U.S.C. §1257(3). While petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. 1257 (3), Respondent respectfully submits that the interlocutory nature of the present case nullifies any assertion of finality and thus eliminates the jurisdictional basis on which the present petition is premised.

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* In Point One of his brief, Petitioner asks this Court to decide, "whether an informer is entitled to immunity from suit, based upon the privilege of nondisclosure granted to the government, when the information given by the informer is demonstrably false, malicious, libelous and defamatory?" Since these allegations clearly represent factors to be considered in the overall balancing test enunciated in *Roviaro* v. *United States,* 353 U.S. 53 (1957) and since the New Jersey Supreme Court remanded the instant matter for additional fact finding in order to reach an equitable balance, Respondent respectfully submits that Point I of Petitioner's brief is manifestly premature.

In general, it may be said that a state court judgment must be final in two respects to fall within the purview of the Supreme Court's appellate jurisdiction. "It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R.Co.* v. *Railroad Commission,* 324 U.S. 548, 551 (1945).

In summarizing the requirement of finality, Mr. Justice Frankfurter, writing for the Court in *Radio Station WOW* v. *Johnson,* 326 U.S. 120, 124 (1945), stated:

> "This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of defrayed justice. Only in a very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. The prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State Court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in State litigation only after 'the highest Court of a State in which a decision in the suit could be had' has rendered a 'final judgment or decree.' This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system."

See also, *Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62, 67-69 (1948); *cf. North Dakota St. Bd. of Pharmacy*

v. *Snyder's Drug Stores, Inc.*, —— U.S. ——, 94 S.Ct. 407 (1973). Justice Frankfurter, however, additionally noted that this concept of "finality" has a "penumbral area" which precludes a purely mechanical application of the rule. Thus, while he held that Nebraska's ruling on the legality of a radio license issued by the federal commission could be reviewed even though the state court had not yet determined the final accounting, he added that ". . . where the remaining litigation may raise other federal questions that may later come here . . . to allow review of an intermediate adjudication would offend the decisive objection to fragmentary reviews." *Id.* at 127.

Therefore, the question evolves into what factors will be relevant to a resolution of the jurisdictional issue of finality. To this end, it has been variously stated that the Supreme Court will examine ". . . both the judgment and the opinion as well as other circumstances [including State law] which may be pertinent" to a resolution of the finality issue. *Gospel Army* v. *Los Angeles*, 331 U.S. 543, 548 (1948). However, in the final analysis ". . . the test is not whether under local rules of practice the judgment is denominated final . . . but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a State court." *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942); *cf., Richfield Oil Corp.* v. *State Board*, 329 U.S. 69, 72 (1946); *Cotton* v. *Hawaii*, 211 U.S. 162, 170-171 (1908). In conjunction with the foregoing approach, the Supreme Court has considered as final, a State court determination which conclusively disposes of a matter *distinct and separate* from the general subject of the litigation. *Clark* v. *Willard*, 292 U.S. 112, 117-119 (1934); See also, *Stern and Gressman, Supreme Court Practice*

96-100 (4th Ed. 1969). Moreover, in a number of cases decided since 1963 the Court has expanded its conception of what is separate and independent for purposes of the finality doctrine. *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 557-558 (1963); *Local No. 438 Const. and General Laborers Union* v. *Curry*, 371 U.S. 542 (1963); *Hudson Distributors Inc.* v. *Eli Lilly Co.*, 377 U.S. 386 (1964); *Brady* v. *Maryland*, 373 U.S. 83 (1963). However, subject to the expansionist trend exhibited in the post-1963 vintage cases, wherein the Court considered such factors as national policy, distinctness of issues, and potential of irreparable injury, respondent respectfully submits that if a judgment contemplates further discretionary action on remand, it is not final and cannot be reviewed by the Supreme Court.

Since the present case falls squarely within the latter category, does not contravene any of the policy considerations espoused in the post-1963 cases, and represents a classic example of an interlocutory appeal contemplating further discretionary State action, it is submitted that Petitioner has not complied with the finality requirement underlying 28 U.S.C. §1257(3). Thus, the jurisdictional prerequisite to the granting of a Writ of Certiorari has not been satisfied.

Ripeness

Furthermore, and of equal importance, is the fact that the present case is patently premature. It is an unassailable tenet of our judicial system that Courts cannot render judgments on federal constitutional questions unless presented in the form of a "case or controversy." United States Constitution, Article III, Section II; *Flast* v. *Cohen*, 392 U.S. 83, 95-98 (1966); *C. Wright, Federal*

Courts 34 (2d Ed. 1963). Embodied in the phrase "case or controversy" is a limitation on the business of the federal courts which confines their authority to deciding "questions presented in an adversary context and in a form capable of resolution through judicial process." *Flast* v. *Cohen, supra* at 95; see also, *United States* v. *Freuhauf,* 365 U.S. 146, 157 (1961); *Federation of Labor* v. *McAdory,* 325 U.S. 450, 461 (1944); *Muskrat* v. *United States,* 219 U.S. 346 (1911). Whether grounded in constitutional principle, see *e.g., Commonwealth of Massachusetts* v. *Mellon,* 262 U.S. 447 (1923); *Fairchild* v. *Hughes,* 258 U.S. 126 (1922), or viewed as a mere policy limitation, see *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288 (1936), federal courts have consistently avoided passing prematurely on questions of constitutional magnitude. Judicial authority may only be invoked when the interests of litigants require protection against actual interference. A hypothetical threat is not enough. Thus, the related doctrines of "standing", "ripeness", and "mootness" which have evolved over the years are incidents of the primary conception that federal judicial power is to be exercised "only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." *Poe* v. *Ullman,* 367 U.S. 497, 504 (1961); *International Longshoremen's and Warehousemen's Union* v. *Boyd,* 347 U.S. 222 (1954); see also, *Boyle* v. *Landry,* 401 U.S. 77 (1971); *State of New Jersey* v. *Sargent,* 269 U.S. 328 (1925); *Ashwander* v. *T.V.A., supra* at 483. As noted by Mr. Justice Brandeis in his concurring opinion in *Ashwander*:

> "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' 'It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'" (citations omitted) 297 U.S. at 483.

Accord, *Wheeler* v. *Barrera,* —— U.S. ——, 94 S.Ct. 2274, 2287 (1974); *Golden* v. *Zwickler,* 394 U.S. 103, 108 (1968); *Pichler* v. *Jennings,* 347 F.Supp. 1061, 1064-1066 (S.D. N.Y. 1972); *Consejo Gen. De Estud Etc.* v. *University of Puerto Rico,* 325 F.Supp. 453, 456 (D.P.R. 1971). The same rule obtains whether the litigation concerns a challenge to the validity of a statute or the claimed denial of a constitutional right. *Poe* v. *Ullman, supra* at 503-504; *Ashwander* v. *T.V.A., supra* at 483; *cf. Cleary* v. *Bolger,* 371 U.S. 392, 402 (1963) (Goldberg, J., concurring).

In the instant matter, petitioners have requested this court to anticipate a question of constitutional magnitude which can best be described as manifestly premature. In this regard, the following excerpt from the State Supreme Court decision in the above-entitled matter is particularly instructive, if not dispositive:

> "While we are satisfied that the Appellate Division correctly identified the balancing test to be applied in cases such as this one, we doubt that either the trial court or the Appellate Division had before it an adequate record to actually perform the delicate and difficult balancing of interests called for. Hence we vacate the order of the Appellate Division directing disclosure of the identity of the informant.
>
> If, on remand, plaintiffs choose to press their motion to compel discovery and either the State or defendants, by a suitable motion for a protective order pursuant to R. 4:10-3, resist discovery, the trial court will be required to consider all the facts

bearing both on the possible unfairness to plaintiffs of denying disclosure of the identity of the informer and the possible harm which may be inflicted on State interests by disclosure." *Cashen* v. *Spann, supra* at 66 N.J. 541, 555.

Since the foregoing language provides petitioner with a clear alternative to a constitutional disposition of the instant matter and since this Court has exhibited an historic aversion to resolving constitutional issues in advance of an obvious necessity, the State respectfully submits that *certiorari* be denied.

POINT II

Nondisclosure of an informer's identity in a civil suit does not deprive petitioner of due process of law under the Fourteenth Amendment of the United States Constitution.

Petitioner contends that nondisclosure of an informer's identity in a civil case constitutes a denial of due process of law. The State respectfully submits that this contention is patently frivolous.

Although historically the government's privilege against disclosing the identity of informers had been absolute or quasi-absolute,* recent authority establishes that it is a qualified privilege, subject to certain exceptions. Thus, in the leading decision on the informer's privilege, *Roviaro* v. *United States,* 353 U.S. 53 (1957), it is stated:

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* See, *e.g., McInes* v. *United States,* 62 F.2d 180 (9 Cir. 1932), *cert.* den. 288 U.S. 616 (1933); *Henrik* v. *Mannerfrid,* 23 F.R.D. 173 (D.C. N.Y. 1959).

"We believe no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." 353 U.S. at 62.

In *Roviaro,* the defendant sought disclosure of the identity of the informant in connection with the issue of guilt. In reversing the ruling of the trial court permitting the Government to withhold the informer's identity, the Court held that where disclosure of the informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.

While *Roviaro* involved disclosure of an informant in a criminal proceeding, the Court's rationale has been universally interpreted to apply with equal force and effect in a civil proceeding. *Westinghouse Electric Corp.* v. *Burlington,* 351 F.2d 762 (D.C. Cir. 1965); *Black* v. *Sheraton Corp. of America,* 47 F.R.D. 263 (D.D.C. 1969); *Wirtz* v. *Continental Finance and Loan Co.,* 326 F.2d 561 (5 Cir. 1964); *Timkin Roller Bearing* v. *U.S.,* 38 F.R.D. 57 (D.C. Ohio 1964); *Bocchicchio* v. *Curtis Publishing Co.,* 203 F.Supp. 403 (D.C. Pa. 1962). See, generally, Anno, "Application, in Federal Civil Action, of Governmental Privilege of Nondisclosure of Informer," 8 A.L.R. Fed. 6 (1971); 8 Wigmore Evidence (McNaughton rev. 1961),

§2374 at 761. Thus, petitioner's general assertion that nondisclosure of an informer's identity in a civil case constitutes a violation of due process under the Fourteenth Amendment is conspicuously without merit.

Furthermore, if defendant's suggestion were adopted, it would establish a precedent devastating to the continued viability of the informer's privilege. This conclusion arises from the fact that any individual, including a criminal defendant, could then obtain disclosure merely by instituting a civil suit and seeking discovery. Thus, the impact of such a ruling would be the effective abrogation, albeit indirectly, of the informer's privilege.

POINT III

Petitioner's request that this Court determine the specific standard to be utilized in considering whether to disclose an informer's identity in a civil proceeding, does not raise a substantial constitutional question.

Petitioner submits that there is a split of authority concerning disclosure of an informer's identity in the context of a civil proceeding. On the one hand, he cites *Black* v. *Sheraton Corporation of America, supra,* and *Bocchicchio* v. *Curtis Publishing Co., supra,* for the proposition that the standard for disclosure in civil actions is more stringent than in a criminal proceeding. On the other hand, he cites *Westinghouse Electric Corp.* v. *City of Burlington, supra,* as support for the proposition that the standard for disclosure is the same in both civil and criminal cases.

What petitioner fails to consider, however, is that the constitutional standard for resolving the question of disclosure has already been formulated. In *Roviaro* v. *United States, supra,* this Court specifically stated:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individuals right to prepare his defense."* *Id.* at 62.

Clearly, the court was indicating that the constitutional requisite governing disclosure of an informer's identity is the utilization of a balancing test. However, rather than delineating every conceivable factor which might be weighed, the court stated:

> "Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Id.* at 62.

Thus, a particular judge is free to consider the totality of the circumstances in an attempt to reach an equitable balance. Accordingly, the decision to grant one factor more weight than another appears to fall exclusively within the purview of judicial discretion and should not be reversed absent a clear showing of abuse.

Since the case *sub judice* has been remanded for further fact finding and since the New Jersey Supreme Court specifically adopted the test announced in *Roviaro,* respondent respectfully submits that the instant petition fails to raise a substantial federal question.

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* See Point II, supra, for a discussion of *Roviaro's* general application to civil proceedings.

CONCLUSION

For all the foregoing reasons, respondent, State of New Jersey respectfully prays that the writ of certiorari sought in the above named petition pending before this Court not issue.

Respectfully submitted,

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